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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 576

PETER JOSEPH TROIANO,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETER JOSEPH TROIANO
Petitioner pro se
96 Bedford Avenue
Brooklyn, New York 11211

INDEX

	PAGE
Opinion Below	1
Jurisdiction	1
Questions Presented	2
Constitutional Provisions Involved	3
Statute Involved	4
Statement of the Case	5
Reasons for Granting the Writ	7
Conclusion	12
Appendix A	A1
Appendix B	A7

Cases Cited

Amos v. United States, 255 U. S. 315 9

Boyd v. United States, 116 U. S. 616, 625-629 (1886) 8, 9

Dennis v. United States, 384 U. S. 855, 86 S. Ct. 1840 (1966) 11, 12

Giordanello v. United States, 357 U. S. 480 9

Go-Bart Co. v. United States, 282 U. S. 344, 357 (1931) 8

Irvine v. California, 347 U. S. 128 9

Kremen v. United States, 353 U. S. 346 (1957) 8, 9

PAGE

Mapp v. Ohio, 367 U. S. 643 9
Miller v. United States, 357 U. S. 301 9

Preston v. United States, 376 U. S. 364, 367-368 (1964) .. 8, 9

Silverthorne Lumber Co. v. United States, 251 U. S. 385 9

Takahashi v. United States, 143 F. 2d 118 (9th Cir. 1944) 9

United States v. Blalock (D. C. E. D. Pa. 1966), 255 F. Supp. 268 10
United States v. Lefkowitz, 285 U. S. 452, 465 (1932) 8

Weeks v. United States, 232 U. S. 383, 393-394 (1914) 8
Wong Sun v. United States, 371 U. S. 471, 481 n. 9 (1963) 8

CONSTITUTIONAL PROVISIONS

Fourth Amendment 2, 3, 9

Fifth Amendment 3, 10

Sixth Amendment 3, 4

STATUTES CITED

Title 28, U. S. C. §1254(1) 2

Title 18, U. S. C. §501 ..... 2, 4, 5

Title 18, U. S. C. §4208(b) 6

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UNITED STATES OF AMERICA,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner, Peter Joseph Troiano, *pro se,* prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit made and entered in this case on July 22nd, 1966.

Opinion Below

The opinion of the Court of Appeals, printed in Appendix A hereto, *infra,* was rendered July 22nd, 1966, and is not reported to date.

Jurisdiction

The judgment of the Court of Appeals was entered on July 22nd, 1966 (Appendix B hereto, *infra*). The time for

filing this petition for certiorari has been extended to and including September 20th, 1966 by Associate Justice William J. Brennan, Jr. The jurisdiction of this Court is invoked under Title 28, U. S. C. §1254(1).

Questions Presented

Petitioner, was convicted by the District Court, sitting without a jury, and sentenced to five years imprisonment for knowingly and unlawfully possessing about forty thousand dollars worth of forged and counterfeit four-cent United States postage stamps with the intent to use and sell them in violation of Title 18, §501, United States Code.

1. Whether, under the Fourth Amendment to the United States Constitution, the postage stamps evidence seized in an auto by federal agents after a dual search, without a warrant, was petitioner's constitutional rights violated?

Whether, under the Fourth Amendment to the Constitution of the United States, was petitioner's rights violated when:

a) the federal agents took the Government witness' auto to the laboratory to scientifically examine the counterfeit postage stamps and then replaced the stamps in the auto and after returning the auto to the hotel, waited for hours until petitioner had entered the auto, before placing petitioner under arrest and again seized the counterfeit stamps which were in the trunk of said auto;

b) the federal agents purposely refrained from arresting the Government witness, after their search and seizure and laboratory analysis proved the postage stamps were spurious, until hours later,

when petitioner entered the witness' auto. Can a tainted search and seizure be rehabilitated and purified by the subsequent arrest?

2. Whether, under the Confrontation Clause of the Sixth Amendment to the United States Constitution, petitioner was denied his constitutional right by the Trial Court's denial of petitioner's application for a reasonable continuance of trial to reclarify the important taped recording of the conference between a "special employee", one Government witness and two federal agents which was partly indiscernible.

Constitutional Provisions Involved

The Fourth Amendment to the Constitution of the United States provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fifth Amendment to the Constitution of the United States provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against

himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Sixth Amendment to the Constitution of the United States provides:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence."

Statute Involved

Title 18, §501, United States Code provides:

§501 Postage stamps and postal cards

"Whoever forges or counterfeits any postage stamp, or any stamp printed upon any stamped envelope, or any die, plate, or engraving therefor; or

Whoever makes or prints, or knowingly uses or sells, or possesses with intent to use or sell, any such forged or counterfeited postage stamp, stamped envelope, postal card, die, plate, or engraving; or

Whoever makes, or knowingly uses or sells, or possesses with intent to use or sell, any paper bearing the watermark of any stamped envelope, or postal card or any fraudulent imitation thereof; or

Whoever makes or prints, or authorizes to be made or printed, any postage stamp, stamped envelope, or

postal card, of the kind authorized and provided by the Post Office Department, without the special authority and direction of said department; or

Whoever after such postage stamp, stamped envelope, or postal card has been printed, with intent to defraud, deliver the same to any person not authorized by an instrument in writing, duly executed under the hand of the Postmaster General and the seal of the Post Office Department, to receive it—

Shall be fined not more than $500 or imprisoned not more than five years, or both."

Statement of the Case

The superseding one-count indictment is set forth at (3a).* Petitioner was indicted on January 31, 1964 for violating §501, Title 18, U. S. C. Prior thereto, and in the fall of 1961, five men including petitioner, were indicted for the identical crime (35a). On October 10, 1961, at 3:45 A.M. petitioner was arrested in a car belonging to one of the former co-defendants named Costello. Earlier, on the evening of October 9th, 1961, a conference ensued in a room in the Benjamin Franklin Hotel in Philadelphia, between former co-defendant Costello, and "special employee" Blaney and two undercover federal agents, which conference was then recorded by other federal agents. Two tapes were made and one was partly unintelligible (98a-109a).

Petitioner was not in the hotel room wherein the recordings were made. Of the four men in the room one was a "special employee", two were federal undercover agents,

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*Numerals in parentheses followed by letter "a" refer to pages of the printed "Appendix for Appellant" in the Court below; nine extra copies of which have been filed herewith.

and the other person was Costello. All four occupants of the hotel room are on the side of the adversary Government. Costello and Noce, although arrested previously and indicted with petitioner were not indicted with petitioner on the superseding indictment. Costello and Noce entered *nolo contendre* pleas on June 9, 1962 and were placed on five years probation (35a). Costello is Noce's nephew.

Prior to petitioner's trial before District Judge Lord, sitting without a jury, and on June 14, 1965, the Court presided at a hearing on petitioner's motion to suppress the $40,000 worth of counterfeit four-cent stamps found in the trunk of Costello's auto (5a-33a). The Court denied the motion, without opinion, after the motion to suppress hearing was concluded (33a).

The trial commenced immediately. Petitioner waived a jury trial (34a). Agent Jordan had testified at the suppression hearing that a recording was made of the conversations in Room 1221 (21a). After several witnesses were called by the Government the defense was permitted to take the two tapes overnight. The following day, June 15, 1965, petitioner moved the Trial Court for a continuance of trial to permit him an opportunity to transcribe one of the tapes and to have the second tape reclarified (159a). The Trial Judge denied the application for the continuance (159a, 161a). After due defense motions (160a-162a) the Court rendered its verdict of guilty (163a). The sentence was subsequently rendered on October 5th, 1965 (165a-174a) under §4208(b) of Title 18, U. S. C. for imprisonment of the maximum of five years (172a).

Reasons for Granting the Writ

Federal Agent Motto's entry into the trunk of the auto for the alleged purpose of expertizing the million counterfeit postage stamps was illegal. At the outset, the agent took the automobile to the United States Customs House to ascertain the genuineness of the stamps (12a) after the agent met special employee Blaney in the lobby of the hotel and was handed the keys to the 1959 Bonneville sedan which was parked outside the hotel (83a). The agent testified he took the car keys, opened up the trunk and saw five boxes. He opened up one of the boxes and saw it contained a quantity of stamps. He immediately determined that these were counterfeit stamps (84a). Agent Jordan testified that Agent Motto and special employee Blaney took the stamps to the Customs House where it was examined and replaced in the automobile (12a). The auto was returned to the same entrance of the hotel. To prevent movability of the auto, two of the agent's cars sandwiched in the Bonneville car bumper to bumper (13a).

The first search of the auto occurred when special employee Blaney gave the car keys to Agent Motto and both proceeded to the Customs House for further analysis after the agent had opened the trunk of the car at the hotel and removed the evidence prior to petitioner's arrest. Of course, this too, was the first seizure. Instead of arresting petitioner, the agents returned the auto to the original precise spot and waited hours for petitioner to approach and enter the auto before arresting him. The car was again "searched" and the evidence was "seized" anew. The Court of Appeals opinion erroneously imputes consent to petitioner as to the car keys (see A2). It was Costello's car and keys.

This was a warrantless arrest. The search and seizure without a warrant was invalid because it was not within

the incident to arrest exception to the warrant requirement nor within the exception pertaining to movable vehicles. There is no suggestion in the record that the interrogation of petitioner disclosed anything incriminating. The officers knew the contents of the auto when they arrested petitioner. After all, the agents had previously seized the auto and searched it prior to petitioner's arrest. Inasmuch as the auto was in the custody of the agents, bumper to bumper, it could hardly be argued that the car could be quickly moved out of the locality or jurisdiction.

Where the search was for any evidence that would incriminate the person arrested, this Court has consistently held the search and seizure unconstitutional as the type of general search that the Fourth Amendment to the Constitution of the United States was designed to prevent. See, e.g., *Boyd* v. *United States,* 116 U. S. 616, 625-629 (1886); *Weeks* v. *United States,* 232 U. S. 383, 393-394 (1914); *Go-Bart Co.* v. *United States,* 282 U. S. 344, 357 (1931); *United States* v. *Lefkowitz,* 285 U. S. 452, 465 (1932); *Kremen* v. *United States,* 353 U. S. 346 (1957). Cf. *Wong Sun* v. *United States,* 371 U. S. 471, 481 n. 9 (1963); *Preston* v. *United States,* 376 U. S. 364, 367-368 (1964).

This Court has held that the search of a motor car not undertaken until persons who had occupied it had been arrested and taken into custody to a police station and that the auto had been towed to a garage was too remote in time or place to have been incidental to arrest, and therefore the search without a warrant failed to meet the test of reasonableness under the Fourth Amendment. which rendered the evidence obtained as a result thereof inadmissible. (*Preston* v. *United States,* 376 U. S. 364,

supra). The Fourth Amendment forbids two things: illegal search and illegal seizure. The arrest followed:

a) The illegal search and

b) The illegal seizure, and was not contemporaneous with it but was subsequent to it. Such procedure is contrary to the Fourth Amendment.

See, *Mapp* v. *Ohio*, 367 U. S. 643; *Irvine* v. *California*, 347 U. S. 128; *Amos* v. *United States*, 255 U. S. 315; *Miller* v. *United States*, 357 U. S. 301; *Giordanello* v. *United States*, 357 U. S. 480; *Kremen* v. *United States*, 353 U. S. 346, *supra*. The search cannot be justified by what is turned up at the search (*Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385). It is apparent that there was no waiver on the part of petitioner to either the previous or subsequent search and seizure, both being separate elements requiring consents (*Boyd* v. *United States*, 116 U. S. 616, *supra; Takahashi* v. *United States*, 143 F. 2d 118 (9th Cir. 1944)).

This Court has not decided a case wherein the police searched and seized a car without a warrant and after discovering incriminating evidence in the trunk of the auto, belonging to a co-defendant, returned the auto to precisely the same place whereat it was taken by the agents, and then awaited its occupancy by petitioner before arresting him and then duplicating the search and seizure.

It is more than irony to note that the Trial Court below has recently granted a motion to suppress evidence when it held that absent evidence that F.B.I. Agents warned a defendant of his right to refuse a warrantless search or that the defendant was aware of his right to do so, the defendant's consent to search, waiving his Fourth Amendment constitutional rights, was not shown to have been intelli-

gent, and the evidence of the bank robbery seized after obtaining such consent was inadmissible (*United States* v. *Blalock* (D. C. E. D. Pa. 1966), 255 F. Supp. 268).

It is undisputed that Agent Jordan of the United States Secret Service made tape recordings of the negotiations which took place in Room 1221 of the hotel (21a). Strangely, although petitioner was not in that room, recordings were made between persons who gravitated to the Government's side after their arrest. One of the tape recordings was unavailable for reclarification purposes despite its incriminatory content against petitioner, in violation of the Fifth Amendment. The defense was surprised at the hearing on the motion to suppress to learn that there were tapes in existence. At the end of the day, the Court allowed petitioner's counsel to take both tapes back to the hotel to listen to them. One tape was partly unintelligible and this conceivably prejudiced petitioner's case for he was unable to develop the fact that it was the Government witnesses who had been the prime movers in this illegal transaction and that petitioner's involvement was one of innocence. In view of the fact that this was not a jury trial, the Trial Court should have exercised a proper discretion by granting a continuance to petitioner for the purpose of transcribing and reclarifying the partially indiscernible tape.

The arrest in the case at bar occurred October, 1961; five defendants were indicted; co-defendants Costello and Noce pled *nolo contendre* in 1962 and were sentenced to probation terms in exchange for their promise to testify against petitioner; hence, since the auto belonged to Costello, the reclarification of the tape was very important to petitioner in order to properly present his defense especially when he just learned of the tapes' existence at the

hearing. The Government could not have been prejudiced by a reasonable continuance of this one-day non-jury trial for such purpose. Petitioner was found guilty that very day.

Costello testified he conducted the negotiations for the sale of the counterfeit stamps. Costello testified he did not know about any counterfeit stamps until he arrived in the room at the hotel (43a, 53a-54a). Costello said he saw the stamps for the first time after he had been arrested (57a). However, the purported buyers had a sheet of the spurious stamps (58a). Where this sample sheet came from remains unexplained. However, as appears from partial tape transcriptions, some light can be shed on the situation. Costello stated that he had never seen the contents of the boxes in the auto (96a). Yet, Costello was recorded electronically as having described the boxes of stamps as having two thousand in a package; one hundred thousand in each wrapper; two wrappers in a box and five boxes (103a). A transcription from the tape shows an admission by Costello "we sent you the samples * * *" (105a). Petitioner was entitled to an opportunity to transcribe and redo the tapes in order to show motive on the part of Costello and Noce, the Government's principal witnesses.

In *Dennis* v. *United States*, 384 U. S. 855, 86 S. Ct. 1840 (1966), this Court reversed the judgment and held that various factors, including the recognition of growing realization that disclosure, rather than suppression of relevant materials, ordinarily promotes the proper administration of criminal justice. The fact that the Government had conceded that the importance of preserving the secrecy of Grand Jury minutes was minimal and had also admitted the persuasiveness of the arguments advanced in favor of disclosure, which fact precluded any allegation that the de-

fense had failed to make out a "particularized need" entitled the defendant to examine the Grand Jury minutes relating to the trial testimony of four Government witnesses while those witnesses were available for cross-examination. Mr. Justice Fortas, speaking for the majority of this Court, said in *Dennis* v. *United States, supra*, at 873 and at 1851:

> "In our adversary system for determining guilt or innocence, it is rarely justifiable for the prosecution to have exclusive access to a storehouse of relevant fact." [citing cases]

In light of the fact that this Court has evinced a more liberal view towards disclosure of Grand Jury testimony, the rule should be broadened to include tape recordings in the prosecutor's possession. This is especially so when the need therefor is so great and has prejudiced petitioner.

The initial search and seizure was illegal. The Government bootstrapped the taint by awaiting petitioner's arrest. This Court should exercise its supervisory powers over the administration of criminal justice herein.

CONCLUSION

It is respectfully submitted that this petition for certiorari should be granted.

Respectfully submitted,

PETER JOSEPH TROIANO
Petitioner pro se

Dated: September 19th, 1966.

APPENDIX A

Opinion of United States Court of Appeals, Third Circuit, Affirming Judgment of Conviction

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 15678

UNITED STATES OF AMERICA,

—v.—

PETER JOSEPH TROIANO,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued April 18, 1966

Before: KALODNER, HASTIE and SMITH, *Circuit Judges.*

OPINION OF THE COURT

(Filed July 22, 1966)

By HASTIE, *Circuit Judge.*

The district court, sitting without a jury, convicted the appellant Troiano and sentenced him to 5 years' imprisonment for knowingly and unlawfully possessing about one million forged and counterfeit four cent United States postage stamps with the intent to use and sell them in violation of section 501 of title 18, United States Code.

Appendix A

On this appeal we consider first whether the district court erred in admitting the counterfeit stamps in evidence, denying the motion of the accused to suppress this evidence as illegally seized. The relevant chain of events began in New York where, according to the testimony, Troiano induced associates to borrow a car for him so that he could deliver what he described merely as "merchandise" to Philadelphia. Before departing for Philadelphia in the borrowed car, Troiano told associates who accompanied him in another vehicle that the "merchandise" was in the borrowed car. Upon arrival in Philadelphia Troiano and his associates parked their cars on the street and went to a hotel, where they made contact with a hotel guest who purported to be a prospective purchaser of the merchandise but was in fact an agent of the United States Secret Service.

In the negotiations which took place in the hotel during the ensuing evening hours, Troiano and his associates disclosed to the prospective purchaser that the trunk of the car driven by Troiano contained a million dollars worth of counterfeit postage stamps. There was much haggling about price and the prospective purchaser expressed concern about the quality of the stamps and insisted upon seeing them and having them examined by his own expert. Accordingly, Troiano surrendered his car keys which the prospective purchaser's "expert", another Secret Service agent, took to the car. The agent unlocked the trunk, satisfied himself by brief inspection that the merchandise was counterfeit stamps and drove the car to the Customs House a few blocks away where a more careful examination of the stamps was made. He then drove the car, still containing the stamps, back to the hotel and returned the keys.

Somewhat later the negotiations collapsed. About 4 A.M. Troiano left the hotel, entered the car and attempted to start it. He was then arrested by Secret Service agents and the car and the stamps were seized. The car was confiscated and duly forfeited as contraband.

Troiano's objection to the use of the stamps as evidence against him is based upon the fact that, acting without a search warrant, the Secret Service agents obtained entry to the locked car containing the stamps by falsely representing themselves to him as prospective purchasers.

The great concern of the law to protect the privacy of the home and the undisturbed possession of other lawful property may dictate rules which deny effect to consent to enter a residence or invade other private property obtained by trickery or misrepresentations. See *e.g. Fraternal Order of Eagles* v. *United States,* 3d Cir., 1932, 57 F. 2d 93. But the car in this case and the counterfeit stamps in it were not property the ownership or possession of which the law protects. See *Brinegar* v. *United States,* 1949, 338 U. S. 160, 176. Quite to the contrary, both the stamps and the car containing them were contraband, subject as such to seizure without warrant and over the possessor's objection. *Brinegar* v. *United States, supra; Carroll* v. *United States,* 1925, 267 U. S. 132, 149; *Armada* v. *United States,* 5th Cir., 1963, 319 F. 2d 793; *cert. denied* 370 U. S. 906. For by statute "any . . . counterfeit . . . obligation . . . of the United States" is declared a "contraband article". 49 U. S. C. §781(b)(3). And stamps are "obligations of the United States" within the meaning of this statute. 49 U. S. C. §787(f); 18 U. S. C. §8; *United States* v. *Pappas,* 2d Cir., 1943, 134 F. 2d 922; *Errington* v. *Hudspeth,* 10th Cir., 1940, 110 F. 2d 384, *cert. denied* 310 U. S. 638. The statute also directs that "any . . . vehicle . . . which . . .

is being used" to carry any contraband article "shall be seized and forfeited". 49 U. S. C. §782.

True, such seizure must be supported by probable cause to believe the vehicle contains contraband.[1] But the representations and admissions of Troiano and his associates gave the agents the best of reasons for believing that the car contained counterfeit stamps. In these circumstances, Troiano's delivery of the car keys with consent to the opening of the trunk and an examination of its contents simplified the agents' task but was not essential to their right to seize the car and stamps without a search warrant. *Drummond* v. *United States*, 8th Cir., 1965, 350 F. 2d 983; *Sirimarco* v. *United States*, 10th Cir., 1963, 315 F. 2d 699, *cert. denied* 374 U. S. 807; *United States* v. *Haith*, 4th Cir., 1961, 297 F. 2d 65, *cert. denied* 369 U. S. 804. Indeed, as has already been pointed out, the seizure of such contraband is expressly required by statute. 49 U. S. C. §§782, 783. The motion to suppress the counterfeit stamps as evidence was properly denied.

The only other substantial question on this appeal concerns the failure of the court to grant a requested continuance of several days' duration to permit defense counsel to have a certain tape recording processed and transcribed in an effort to clarify portions of the recording that were garbled and unintelligible.

The circumstances were these. Certain of the negotiations in the hotel concerning the sale of stamps were secretly monitored by a government agent and recorded

[1] Although generally the courts discourage searches without warrants, the easy mobility and likelihood of escape which characterize an automobile parked on the public street justify the search of such a vehicle upon adequate probable cause, without delay until a search warrant can be obtained. See *Husty* v. *United States*, 1931, 282 U. S. 694, 701; *United States* v. *Walker*, 4th Cir. 1962, 307 F. 2d 250, 252.

on a tape recorder. On the first day of trial, the prosecutor, who planned to call participants in the recorded negotiations as witnesses, advised defense counsel of the recordings and surrendered the tapes to defense counsel for overnight examination. The following day the defense used some of the recorded statements in cross-examining and attempting to impeach a witness.

However, parts of the recording were indistinct and even unintelligible. Accordingly, defense counsel requested a continuance of several days' duration to permit an effort to process and transcribe the tape in the hope that the blurred portions would become intelligible. The court denied the motion.

We think this action was a proper exercise of discretion. The government had fully disclosed and surrendered to the defense its complete record of what the witnesses had said. The tapes were no less intelligible to the defense than to the prosecution. Nothing appeared that indicated a probability that the garbled portions of the tape could be made intelligible. The defendant merely hoped that the recording could be clarified and that if clarified, it might reveal something useful. Moreover, since the tapes themselves would not have been admissible to prove the truth of any statement thus recorded, and the witnesses whose conversations were recorded were available, it is at least very doubtful whether the defense could have derived any benefit from a clarification of the recording. It is not obligatory that the court suspend the trial to permit the defendant to pursue this unpromising and speculative undertaking.

We find no merit in any of the appellant's other contentions.

The conviction and sentence will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

[File Endorsement Omitted]

APPENDIX B

Judgment of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 15,678

UNITED STATES OF AMERICA,

—vs.—

PETER JOSEPH TROIANO,

Appellant.

(D.C. Criminal No. 21627)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: KALODNER, HASTIE and SMITH, *Circuit Judges.*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed October 11, 1965, be, and the same is hereby affirmed.

Attest:

IDA O. CRESKOFF
Clerk

July 22, 1966

[File Endorsement Omitted]